

Legal Issues in CERTIFICATION

How does the proposed R2:2013 standard stack up against the e-Stewards standard? What are the legal issues e-scrap processors need to be aware of? Lawyers from Schnader Harrison Segal & Lewis LLP offer their perspective.

By John Britton, Ron Cusano, and Levi Jones

Electronics recyclers have always had to deal with uncertainty and change in their industry, which can come from any number of sources. One of the significant sources of uncertainty is in trying to predict how changes in certification standards will affect the costs for recyclers. Now, a new round of changes to the R2 certification standards looks to make R2 more closely resemble the e-Stewards standard, which could lead to increased compliance costs.

This article briefly addresses some of the differences between the R2 and e-Stewards standards and whether R2:2013 narrows these differences.

Two competing standards

On December 16, 2012, the public comment period for the draft R2:2013 standard closed. R2:2013 is a proposed update of the Responsible Recycling Practices for Use in Accredited Certifications Programs – commonly known as the R2 standard – which was released in 2008.

Under the auspices of R2 Solutions, the nonprofit organization that houses and advocates for the R2 standard, the multi-stakeholder R2 Technical Advisory Committee (TAC) recently finished reviewing the public comments. Barring the need for an additional public comment period, the TAC will submit the proposed R2:2013 standard, with any revisions, to the R2 Solutions Board of Directors, which then will have 60 days to review and approve the standard for use.

R2 Solutions and involved stakeholders have stated that they intend for this process to strengthen the requirements of the current R2 Standard for the safe and responsible recycling and handling of used and end-of-life electronic products. In light of certain perceived deficiencies in the current R2 standard by some in the industry, this process warrants continued public discussion before finalization of R2:2013 on the scope and focus of the new standard vis-a-vis the competing e-Stewards Standard for Responsible Recycling and Reuse of Electronic Equipment, sponsored by the Basel Action Network (BAN).

The history of these dueling standards is short but contentious. Through a collaborative, transparent and multi-year process, an electronics industry stakeholder group, facilitated by the U.S. Environmental Protection Agency, spearheaded the development of the R2 standard. The goal was to create a voluntary, market-based regime for ensuring best practices in the electronics recycling industry with respect to the handling, recycling and disposal, including in developing countries, of used electronic products and their hazardous components. The initial consensus approach of the stakeholders was short-lived.

Representatives of environmental organizations, in particular BAN and the Electronics Takeback Coalition, were early participants in the process but withdrew due to their concerns that the R2 standard did not fully satisfy the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (Basel Convention), a comprehensive, international agreement on hazardous and other wastes (that was signed but not

ratified by the United States).

With the support of certain recyclers, a number of large corporations and environmental groups, such as the Sierra Club, Greenpeace, the Natural Resources Defense Council and the Electronics Takeback Coalition, BAN developed the e-Stewards Standard, which addressed the perceived deficiencies of the R2 Standard.

Due to the widespread recognition among all stakeholders in the electronics industry of the need for a verifiable set of best practices for recyclers, both R2 and e-Stewards have been embraced globally. In fact, the number of recyclers certified under one or the other regime has grown significantly in the past few years.

Recent legislative activity on the state level also reflects the growing industry reliance on these best practices standards. For instance, the State of Colorado passed legislation last session with the intent of diverting electronic products from landfills in favor of recycling under either R2 or e-Stewards certification, and the states of Nebraska and Hawaii are currently considering legislation with similar recycling certification requirements under the two standards.

Increasingly, recyclers who choose to certify their practices are doing so under both R2 and e-Stewards. To further this trend, at the September 2012 E-Scrap Conference, Best Buy, one of the largest electronic products retailers with a comprehensive recycling program for its customers, announced a policy that it would use only recyclers certified under both regimes.

Need-to-know differences

R2 and e-Stewards offer e-scrap processors a choice of responsible recycling practices based on outcomes it and its customers may demand. Due to the acknowledgment among all stakeholders of the adverse environmental and social impacts of indiscriminate disposal of electronic products (such as e-waste processing in developing countries), there is no dispute on the need for safe, responsible and ethical practices for the handling and re-use of used electronic products. Also, there is widespread agreement on the need for the dissemination of information concerning best practices in the recycling industry.

To this end, both R2 and e-Stewards set out verifiable practices to differentiate processors based on their responsible management and handling procedures and ethical

practices with respect to recycling and the export of electronic products and components thereof containing hazardous materials. Both standards establish the reuse-recover/recycle-safe disposal/accountability hierarchy of overall responsible management strategies and require accredited third-party verification for certification.

The rift between these two regimes arises out of the divergence of outcomes as a result of the scope and detail of their provisions and whether such provisions set out certain practices as mandates or leave their implementation to the discretion of the recycler.

For proponents of the e-Stewards standard, the deficiencies in the current R2 standard are most apparent in provisions addressing (i) on-site workers' health and safety, (ii) the export of used or end-of-life electronic products, and potentially hazardous products, to developing countries, (iii) use of landfills or incineration, and (iv) use of prison labor in the recycling chain. Discussions with recently-certified recyclers reveals that they chose either R2 or e-Stewards, or in a few cases both, based on a desired policy outcome, e.g., ban on exports to developing countries, concerns for data security, or certain administrative or financial reasons (e-Stewards is generally perceived as imposing significantly higher accountability costs and some recyclers may consider BAN too dogmatic). In these categories particularly, its proponents assert that the e-Stewards standard is more comprehensive.

How then does the proposed R2:2013 standard stack up against the e-Stewards standard? In two of the categories, there remains a philosophical chasm – use of prison populations in recycling activities (e-Stewards prohibits) and use of landfills (R2:2013 allows under certain conditions).

With respect to workplace safety and exports to developing countries, however, even a cursory review of R2:2013 reveals provisions that set a higher bar for recyclers over that in the current R2 standard. The proposed R2:2013 standard strengthens required practices in these areas and reduces the overall discretion currently allowed recyclers under R2.

For example, R2:2013 eliminates the discretion left to an electronics recycler to operate under its own environmental, health and safety management system (EHSMS), a principal criticism of R2 by the proponents of the e-Steward standard. Instead, R2:2013 requires that a recycler be certified to one or more EHSMS standards approved

by R2 Solutions and verified to such standards by an independent Accredited Certification Body (ACB). Importantly, R2:2013 and the accompanying certified EHSMS remove the uncertainty under the current R2 standard in identifying on-site risks and the necessary engineering, administrative and workplace practice controls, including monitoring and sampling protocols, for workforce and environmental protection, an approach closer to that of e-Stewards. Furthermore, similar to e-Stewards and distinct from the current R2, R2:2013 expressly incorporates ISO 14001 and OHSAS 18001.

Different takes on exports

Exports of used electronic products and related hazardous materials to developing countries and their contribution to the proliferation of e-waste in such countries are the most contentious of the issues between R2 and e-Stewards. Due to unregulated disposal practices, e-waste in developing countries, which includes exports from the United States and other developed countries, combined with electronics discarded by consumers in the importing countries, has become a seemingly intractable environmental and public health problem.

Already mentioned is the fact that some recyclers choose certification under the e-Stewards standard primarily due to its ban on exports to developing countries. The Solid Waste Association of North America recently announced its position on the handling of e-scrap which brings it more in line with those groups advocating for a ban on such exports. And recyclers and downstream shippers are prudent to pay close attention to the flow of trade of their used electronic products and e-scrap, particularly in light of the recent conviction of a Colorado recycling company (not certified) and two of its executives for violations, among other things, of United States export laws with respect to shipments of hazardous e-products.

The current R2 standard allows exports of used electronic products and related hazardous materials to developing countries generally if such shipments are consistent under the importing country's law. The proponents of e-Stewards charge that there is no mechanism to ensure adherence to an importing country's law. The e-Stewards standard aligns its requirements to the Basel Convention and other international agreements, including those of the Organization for Economic Cooperation and Develop-

ment (OECD), to eliminate all potential e-waste from disposal in developing countries.

Put simply, e-Stewards prohibits exports of used electronics and e-scrap to developing countries. The proposed R2:2013 does not go this far and there is still tension between R2 Solutions and BAN as a result of the latter's strict adherence to the Basel Convention on this matter.

While still allowing exports of used electronic products and related hazardous materials to developing countries, R2:2013 sets out requirements to tighten export procedures and attempts to close the vagaries in the current R2 standard that may have allowed poorly documented or unauthorized shipments of what ultimately would be e-waste. To reduce the proliferation of e-waste in developing countries, the proposed R2 2013 establishes certain export and downstream due diligence requirements that exceed those in the current R2.

In particular, R2:2013 requires a recycler to develop an explicit plan to maintain full compliance with all applicable import and export laws covering substances that are identified as Focus Materials and shipments of untested or non-functioning equipment or components containing Focus Materials. These are materials in the used or end-of-life electronic equipment that warrant particular care due to their "toxicity or other adverse worker health and safety, public health, or environmental effects that can arise if the materials are managed without appropriate safeguards."

The proposed R2:2013 approaches export controls from a somewhat different angle. Specifically, the R2:2013 Import/Export Compliance Plan – a component of the newly-required, non-discretionary EHSMS – requires recyclers to identify and document, under the laws of both the exporting and importing countries, the legality of all international shipments of Focus Materials and untested or non-functioning equipment or components containing Focus Materials, that have passed through

the recycler's facility or control, including shipments made by downstream vendors and shipments transferred through another country. The recycler has the duty to obtain documentation from any country receiving or transferring such shipments showing that each country accepts such shipments and demonstrates compliance of each shipment with the applicable export and import laws, extended to both OECD and non-OECD countries.

In addition, the recycler would have to document the legal basis, *e.g.*, a copy of a law or court ruling, or original documentation from the relevant competent authority, in both the importing and exporting countries for allowing the shipment. The recycler also would be required to periodically audit its compliance with such legal requirements. Thus, the proposed R2:2013 not only requires compliance with the relevant import and export laws, but also mandates, with a concomitant increase in cost for the recycler over current R2 practices, a strict standard for demonstrating such compliance.

In short, the change under R2 2013 expressly requires that, prior to each shipment, the recycler must identify the countries receiving or transferring such shipment, obtain documentation demonstrating that each country legally accepts such shipment, and demonstrate the compliance with each applicable export and import law.

This enhanced regime would include complex procedures applicable to the management of reusable equipment to identify such equipment as (i) Tested and Fully Functioning, R2/Ready for Reuse; (ii) Tested for Key Functions, R2/Ready for Resale; or (iii) Evaluated and Non-Functioning, R2/Ready for Repair.

R2:2013 does not satisfy the e-Stewards standard's strict adherence to the Basel Convention, in particular with respect to express approval from the importing country concerning shipments from the United States, a non-party to the Convention. It does conform closely, however, to the recommen-

dation of the federal government's Inter-agency Task Force on Electronics Stewardship, which has identified as top priorities reducing harm from exports of e-waste and ensuring the safe handling of used electronics in developing countries. In its National Strategy for Electronics Stewardship, the Task Force has recommended, among other things, the collection and sharing of information on the trade flows of used or end-of-life electronic products, in particular, amounts exported or imported.

Final thoughts

While the proposed R2 2013 likely will not eliminate all of the bases for separate R2 and e-Stewards camps, the proposal increases the level of required due diligence and focus on the part of a certified recycler, particularly with respect to on-site workers' health and safety and the elimination of harmful e-waste disposal in developing countries. If kept intact in the final R2:2013 standard, the updates will contribute significantly to the overall credibility of the recycling certification system. **ESN**

John Britton and Levi Jones practice in the Washington D.C. office of law firm Schnader Harrison Segal and Lewis LLP, and can be reached at jbritton@schnader.com and ljones@schnader.com, respectively. Ron Cusano practices in the Pittsburgh office of Schnader and can be reached at rcusano@schnader.com. All three are members of Schnader's Environmental Practice Group, which addresses a wide range of environmental issues, including emerging problems related to the handling, recycling and disposal of electronic products.

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